

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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Cranesville Block Co., Inc.,

Employer,

Case No. 3-RC-190952

and

TEAMSTERS LOCAL294,

Petitioner.

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**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S  
SUPPLEMENTAL DECISION AND ORDER ON CHALLENGED BALLOT AND  
OBJECTIONS**

The Employer, Cranesville Block Co., Inc., submits this Request for Review pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board ("Board" or "NLRB") in response to the Supplemental Decision and Order on Challenged Ballot and Objections dated May 8, 2017 ("SD&O"). For the reasons stated below, the Board should reject the Director's findings, recommendations and decision, sustain the Employer's objections and set aside the election.

**PARTIES/WITNESSES/PROCEEDINGS**

The Employer is a family owned business, which manufactures, sells and delivers concrete and cement products. It has approximately 10 locations in New York State, with 120+/- trucks and other pieces of heavy equipment. The Employer's headquarters is located in Amsterdam, New York.

The Employer's Amsterdam facility houses a maintenance garage, which included 5 employees during the time frame in question. The attempted unionization of that maintenance

garage under the guise and direction of William/Bill Deming (“Deming”) is the subject of this dispute.

The following witnesses testified at the hearing:

John Tesiero IV (“Tesiero IV”) – General Manager  
Richard Dwyer (“Dwyer”) – Fleet Manager  
James Green (“Green”) – Shop Mechanic  
Michael Augustine (“Augustine”) – Plant Manager  
William (Bill) Deming (“Deming”) – Shop Supervisor (and party whose conduct and status is in dispute)

The subjects of their testimony in relation to this dispute are quoted below, and the transcript of the hearing in its entirety is included herewith and incorporated by reference into this Request for Review.

### **STATEMENT OF THE CASE**

Applicable laws and standards make clear that voters in a Board election must be able to cast their vote free from coercion. As quoted in the Argument section below, an election must be set aside where objectionable conduct could well have affected the outcome of the election.

This is exactly such a case in that a supervisor introduced, promoted, and openly sought to advance the process of unionizing Employer’s shop by participating in unionization meetings with employees working under him, conveying his support for unionization to them, soliciting employee signatures on union cards, informing employees that their jobs may be lost if they do not get the union in the shop, and informing employees that raises may not be forthcoming if they do not get the union in the shop.

The record concretely demonstrates that supervisor Deming engaged in such conduct. However, the Regional Director (and Hearing Officer) erred in finding that Deming did not qualify as a supervisor under the Act, and thereby condoned the objectionable conduct of Deming which could well have affected the outcome of the election. The Regional Director’s

(and the Hearing Officer's) findings, recommendations and decision are in error, ignore pertinent facts and testimony, and the Employer takes exception thereto as more specifically set forth herein on each of the following points:

- The Regional Director (and Hearing Officer) erred in finding and concluding that Deming does not qualify as a supervisor under the Act because:
  - The record demonstrates the existence of Deming's authority to assign work, including independent judgment in respect thereto.
  - The record demonstrates the existence of Deming's authority to direct the work of others, including independent judgment in respect thereto.
  - The record demonstrates the existence of Deming's authority to discipline employees and/or recommend discipline, including independent judgment in respect thereto.
- The Regional Director (and Hearing Officer) erred in failing to recognize the testimony and record proof that Deming did engage in the objectionable conduct cited by the Employer, thereby demonstrating that the objectionable conduct could have affected the outcome of the election. The objectionable conduct was as follows:
  - The record demonstrates that Deming did attend unionization meetings and voice support for unionization to employees.
  - The record demonstrates that Deming did solicit employee signatures on union cards.
  - The record demonstrates that Deming did inform employees that their jobs may be lost if the shop was not unionized.
  - The record demonstrates that Deming did inform employees that raises may not be forthcoming if the shop was not unionized.

The Employer submits that the Regional Director's (and Hearing Officer's) determinations are flawed based upon incorrect, incomplete and erred factual findings and legal conclusions, and therefore, should not be adopted. The Employer's objections should be sustained and the election set aside.

#### **STANDARD OF REVIEW**

The Board reviews *de novo* the underlying decision and its underlying rational. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950); *Sand's Bethworks Gaming, LLC*, 361

NLRB No. 102 (Nov. 12, 2014). Where the legal conclusions are not based on resolutions of all the relevant facts, the Board should make its own factual findings. *Williamson Mem'l Hosp.*, 284 NLRB 37 (1987). Moreover, “where credibility resolutions are not based primarily upon demeanor, it is well settled that the Board itself may proceed to an independent evaluation of credibility.” *Electrical Workers IBEW Local 38 (Cleveland Electrical)*, 221 NLRB 1073, 1074 (1975); *Harry Lunstead Designs*, 270 NLRB 1163 (1984).

### **ARGUMENT**

An election must be set aside *where* “***objectionable conduct could well have affected the outcome of the election.***” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (emphasis added); *Sanitation Salvage Corp.*, 359 NLRB 1129 (2013) (“The Board overturns election results if the objectionable conduct, taken as a whole, had the tendency to interfere with the employees’ freedom of choice and could well have affected the outcome of the election”) (internal citations omitted).

Both the Regional Director and the Hearing Officer ignore this important legal standard cited by the Employer. In the present case, the relevant voting unit was very small and was to exclude “supervisors” as defined in the Act. (RRO p. 2). Nevertheless, not only did a supervisor attempt to participate in the vote, but he was also the leading proponent of unionization and engaged in multiple instances of pro-union conduct, all of which “***objectionable conduct could well have affected the outcome of the election.***” *Id.*

The tally of ballots prepared at the conclusion of the election shows that of the 4 eligible voters, 2 votes were cast for the Petition seeking unionization, 1 vote was cast against the Petition and 1 vote (Demning’s vote) was challenged on the basis of eligibility. The Employer

objected to the results of the election asserting that Deming was an ineligible supervisor, who during the critical period:

- (1) Solicited employee signatures on union authorization cards;
- (2) Attended meetings voicing support for the union;
- (3) Provided the union with materials used by the Employer during the union organizing campaign; and
- (4) Informing employees that they would lose their jobs if they did not vote for unionization.

(RRO p. 2). Any one of the above objectionable circumstances undoubtedly “*could well have affected the outcome of the election.*” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (emphasis added).

**I. The Evidence Demonstrates, and the Petitioner does not deny, that Deming Engaged in Conduct that Could well have Affected the Outcome of the Election.**

During the course of the hearing, Deming’s promotion of unionization and pro-union conduct was repeatedly conveyed and/or acknowledged as follows:

Green Testimony –

Q: Okay. And in your presence, did Mr. Deming make any comments regarding the union? [At meeting at the Windmill Diner in Amsterdam, NY].

A: Yeah. That’s how - -yeah. He wanted the union, that’s how it all started.

...

Q: All right. This is what Deming said?

A: Well yeah. Pretty much that’s what he said at first; we could all be looking for other jobs . . .

Q: . . . And did he indicate in your discussions with him during this time period anything about if the union was not elected what would happen with salaries?

A: Probably wouldn’t get no raises. Be the same or they could knock it down a little bit even, you know.

...

Q: Okay. I don’t want to know what your answer was, okay, but did Mr. Deming ever ask which way you would prefer to go with the union?

A: Yeah.

Q: All right. Don’t say what it was, and did he respond to that answer?

A: The way I was - - yeah.

Q: What did he say?

A: Can’t afford that.

...  
(Trans. p. 106, 108 & 112-113).

Deming Testimony –

Q: Were you involved in soliciting signatures for cards for the union when the union organizing was going on?

A: Yes.

...  
Q: When you got the cards, did you talk to Mr. Green about your opinion regarding the union?

A: Yes.

Q: Okay. And was your opinion in favor of the union?

A: Yes, it was.

...  
(Trans. p. 197-198).

The Employer took and takes exception to each of the findings, recommendations and decision that the Employer's objections be overruled (SD&O p. 7-10; RRO p. 7-9), all of which were built on an initial finding that Deming was not a supervisor and the premise that "pre-petition conduct generally will not be grounds for setting aside the results of a Board election." (citing *Ideal Electric Manufacturing Co.*, 134 NLRB 1275 (1961)). The Regional Director's (and the Hearing Officer's) analysis and review, however, incorrectly ignore the more recent "could well have affected the outcome of the election" legal standard set forth in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (emphasis added), and additionally, ignore the testimony quoted above in relation thereto.

Moreover, even if the *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) two step inquiry cited by the Regional Director is applicable: (a) Deming was a supervisor who exercised control and influence over all of the voting employees; (b) Deming's conduct interfered with their freedom of choice; (c) the margin of victory in the election was very thin; (d) Deming started and led the pro-union charge which included only employees that he supervised; and (e)

Deming engaged in conduct and made lingering statements reinforcing his efforts to secure unionization of the shop he ran.

Furthermore, the Regional Director's conclusion that Deming does not have such supervisory assignment authority necessary to "retaliate against" employees is not factually correct. The testimony (ignored by the Regional Director) demonstrates that Deming had the authority to assign "dirty" versus "clean" tasks to employees, including dirty/unfavorable tasks such as: (a) roadside breakdowns; and (b) manually breaking/chipping away hardened concrete from trucks. (Trans. p. 24-25). In addition, demonstrating such authority and concerns, Green testified that he requested a transfer immediately after the election because he feared the environment after he voted in the manner he did. (Trans. p. 120-121).

As the Regional Director noted, the voting unit was very small in size and as such influence is not insignificant, (SD&O p. 9), and per the legal standard the Board is to consider whether such conduct "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

Characterizing the conduct of Deming as pre-petition as the Regional Director (and Hearing Officer) do in an effort to avoid the issue, does not escape the legal standard and undeniable fact that such conduct "could well have affected the outcome of the election," especially given the small voting pool, direct/daily nature of Deming's influence over that voting pool, and Deming's ability to retaliate.

The Board should not adopt the Regional Director's efforts to further back-fill the Hearing Officer's RRO, and instead should consider *de novo* whether the actions of Deming "could well have affected the outcome of the election." The evidence strongly supports that conclusion, and thus, Employer's objections should be sustained and the election set aside.

## II. Deming is a Supervisor.

Per the express terms of 29 U.S.C. § 152(11) “[t]he term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Per the Courts and NLRB the existence of any one of the enumerated powers combined with independent judgment is sufficient to confer supervisory status, regardless of how seldom or often such power is exercised. *George C. Foss Co. v. NLRB*, 752 F.2d 1407 (9<sup>th</sup> Cir. 1985); *Northeast Utils. Serv. Corp. v. NLRB*, 35 F.3d 621 (1<sup>st</sup> Cir. 1994). Stated differently, *the language of 29 U.S.C. § 152(11) defining supervisor is to be interpreted in the disjunctive so that a person having authority in only one of the enumerated areas may be held to be a supervisor*. *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1 (5<sup>th</sup> Cir. 1971) (emphasis added). It is the existence of supervisory powers set forth in 29 U.S.C. § 152 that determines whether an employee is a supervisor, and it is not necessary that the employee regularly and routinely exercise those powers. *Central Casket Co.*, 225 NLRB 362 (1976).

In addition to the primary indicia set out in the Act, the Court and NLRB may also consider factors such as whether the employee is perceived by others to be a supervisor. *NLRB v. Baby Watson Cheesecake*, 148 BNA LRRM 2897 (2<sup>nd</sup> Cir. 1994).



- A. Assigning Work and Responsibility to Direct – The Employer takes exception to the Regional Director's (and Hearing Officer's) findings, recommendations and decision with regard to the assignment of work and responsibility to direct aspect of the supervisor definition.

The testimony of the various witnesses demonstrated that Deming had the power and responsibility to assign and direct work, and also regularly exercised such duties using independent judgment. More specifically, the following testimony was provided at the hearing:

Tesiero IV Testimony –

Q: All right. As to the 10 maintenance facilities, below Richie [Dwyer – Fleet Manager], are there, you know, supervisors, as you understand them to be in the individual maintenance facilities?

A: That's correct. So as I eluded to, of the 10 or so maintenance facilities, each garage would have a supervisor assigned to that garage.

Q: Okay. And restricting this question solely to the Amsterdam, New York maintenance garage, was there a supervisor that was assigned to that garage by the - - by Cranesville?

A: Yes.

Q: And who is that?

A: That is Bill Deming.

...

Q: Okay. Now based upon your direct knowledge, okay, and Mr. Deming's daily duties, does he have the right [and] independent judgment to direct work to be done by the employees working in the shop?

A: Yes, he does.

Q: And to your knowledge, in your presence, has he given those directives to mechanics?

A: Yes he has. Every morning I start my day going to the Amsterdam garage. When I get to the facility, Bill Deming is my point of contact. I seek Bill. I find Bill and we go over the day's work. Within this conversation, Mr. Deming will tell me which employee is responsible for which job task. He'll assign this jo[b] task based on aptitude and ability. . .

Q: Is Mr. Deming the most senior employee in his garage?

A: He is.

(Trans. p. 13-15, 36).

Dwyer Testimony –

Q: Based on your direct knowledge, and your observation, all right, on a daily basis does Mr. Deming have the authority to direct work to be done by the employees working in the Amsterdam facility?

A: Yes.

Q: And has - - does he do that?

A: Yes, he does.

...

Q: Have you seen Mr. Deming work in the garage and oversee the work of other mechanics?

A: Yes.

Q: Can you tell the hearing officer what he does when he oversees the work of the other mechanics?

A: He - - he looks at their skill and ability, makes sure that they're doing it right, you know . . .

Q: Okay. Have you - - who do the mechanics come to if they have a work problem or task problem?

A: Bill.

Q: And - - and does Mr. Deming have the authority to address those issues?

A: Yes.

...

Q: Okay. You said that during the course of a day, separate from the DVIR reports, during the course of the day, all right, do - - do jobs come up that need to be performed on various pieces of equipment or trucks?

A: Yeah, if they break down.

Q: Okay.

A: Yeah.

Q: Who would be the person in the Amsterdam shop or garage to assign performance of tasks to put that truck back on the road?

A: Bill [Deming].

Q: And how often does he do that?

A: Depends on if the truck breaks throughout the day. Two or three times a day could be.

...

Q: Okay. Other than the DVIR reports, okay, and other than breakdowns on the road, all right, are there other maintenance tasks that are regularly scheduled on vehicles?

A: Yeah, there's servicing.

Q: Servicing, okay. Who identifies the mechanic to do servicing on a specific - - or particular vehicles?

A: That would be Bill [Deming].

(Trans. p. 52, 63, 66, 84).

Green Testimony –

Q: . . . Did Bill [Deming] give directions to people?

A: Yeah.

Q: Yeah?

A: Yeah.

Q: Did you take directions from Bill [Deming]?

A: Well, yeah.

...

Q: All right. During the day within your shift and Mr. Deming's present with you, you pretty much work parallel shifts?

A: Yes.

Q: Did - - who is the person that primarily gave you direction, Mr. Stewart - - Justin - - or Mr. Deming?

A: Mr. Deming.

...

Q: Okay. Who told you, who was the first management person to tell you that Bill Deming is a supervisor?

A: Oh, when I got hired Bill was the head of the garage, I was told that.

...

Q: . . . Who - - was there anybody there that looked over the work to be sure that it was being performed properly?

A: No, just Bill.

Q: So it was Bill?

A: Yeah.

Q: Mr. Deming?

A: Yeah.

Q: Do you know what - - can you describe for the hearing officer what he did?

A: Who what?

Q: What he would do by overlooking the work? What did he - - what's - - did he walk? Did he look? . . .

A: Well, make sure that, you know, everything was fixed right because you know, you got, you know, a lot of weight, safety issues, so he would make sure, you know, so nobody would get hurt or anything.

...

(Trans. p. 98, 101, 118, 128).

The Regional Director seeks to avoid this testimony by attempting to minimize Deming's level of independent judgment and by asserting that there is insufficient evidence of Deming's exercise of such authority. However, it is the existence of such authority that is key, as per the NLRB it is the existence of supervisory powers set forth in 29 U.S.C. § 152 that determines whether an employee is a supervisor, and it is not necessary that the employee regularly and routinely exercise those powers. *Central Casket Co.*, 225 NLRB 362 (1976). Each of the above witnesses confirmed the existence of such authority (and his exercise of such independent judgment). Moreover, it is undisputed that Deming is the person that checks the work quality of the mechanics to ensure that the employees have performed the work that he directed and

assigned to them in a safe and correct manner. (Trans. p. 63). The fact that Deming assigned tasks taking into account the relative skills or experience of the given employee, does not strip Deming of his authority to direct and assign the work to be done at the shop as the Regional Director indicates. (SD&O p. 4-5). This was a shop of only four (4) mechanics, plus Deming. The fact that he had newer employees perform more simple tasks, does not make Deming's assignment of work responsibilities "self-evident" or strip him of the existence of authority. Moreover, Green who was the most senior of the mechanics in the shop testified that he "usually got stuck with the crap. . ." work, thereby evidencing that assignments were not made based simply on experience. (Trans. p. 121).

Clearly, the Regional Director erred in failing to recognize Deming's assignment of work and work direction responsibilities and authority, along with his exercise of such authority with independent judgment. The Act recognizes Deming as a supervisor, and thus, his conduct in promoting unionization was objectionable and supports setting aside the election which he improperly influenced using his status over the mechanics operating under his authority.

B. Discipline/Recommending Discipline – The Employer takes exception to the Regional Director's (and Hearing Officer's) findings, recommendations and decision with regard to discipline/recommending discipline aspect of the supervisor definition.

As stated in the law quoted above, "[i]t is the existence of supervisory powers set forth in 29 U.S.C. § 152 that determines whether an employee is a supervisor, and it is not necessary that the employee regularly and routinely exercise those powers." *Central Casket Co.*, 225 NLRB 362 (1976).

With regards to discipline, the following testimony was provided at the hearing:

Tesiero IV Testimony –

Q: Okay. And is there - - as part of his daily duties, has he [Deming] recommended various degrees of discipline - - recommended or implemented various degrees of discipline on mechanics for violation of work duties or - - Employer policies?

A: Yes, Mr. Deming has recommended discipline. One example of this, Mr. Deming sought Mr. Dwyer, our fleet manager, regarding an employee that works under Mr. Deming direction, who was working unsafely and was causing damage to the wheel studs on a vehicle. Mr. Deming recommended to Mr. Dwyer that we get rid of the employee.

...  
Q: Can you give the hearing officer - -

A: He has also - - he - - you, Mr. Deming views this as his shop. He prefers his shop to be clean. If an - - if an employee left his work space a mess, Mr. Deming would reprimand him, verbally telling him, you know, you need to clean this up. Don't act like a slob. Mr. Deming would also review the employees' work. He would look at their work, and if he saw a problem with that work, Mr. Deming would confront the employee and tell them, you know, this is how it needs to be done. . .

...  
Q: Okay. And - - if discipline was to be imposed or had been imposed by Mr. Deming, did you endorse his actions?

A: Yes.

(Trans. p. 16-18).

Green Testimony –

Q: Okay. Did you ever witness Mr. Deming disciplining a co-worker?

A: If they were - - you know, I mean if they were doing something that maybe wasn't - - safety, you know, what I mean, he would tell them, you know, listen, you got to straighten up. You can't be doing that, you know, or something like that. Or picking up areas, you know what I mean, because that's a lot to do with safety and stuff like that. .

(Trans. p. 104).

The Regional Director attempts to minimize the existence of Deming's authority by pointing out an incident where the Employer's general manager investigated the circumstances underlying Deming's recommendation that a certain employee be fired. (SD&O p. 6). The Regional Director, however, ignores the evidence establishing that the Employer had an established policy of "progressive discipline" in place, meaning that termination may be inconsistent with that policy, and therefore, it is only prudent that the general manager first ensure that the recommended punishment complies with company policy. (Trans. p. 40).

Moreover, the fact that there is not a litany of discipline incidents to recite reflects the small size of the shop and the fact that Deming ran a well supervised shop, circumstances that do not strip him of the existence of his disciplinary authority.

Clearly, the record supports the existence of independent discipline authority and the power to recommend discipline, powers that go hand-in-hand with Deming's duty to oversee the garage and the quality of the work that he directed the mechanics to perform. The Regional Director (and Hearing Officer) erred in failing to recognize the existence of Deming's discipline authority. As a result of such authority, the Act recognizes Deming as a supervisor, and thus, his conduct in promoting unionization was objectionable and supports setting aside the election which he improperly influenced using his status over the mechanics operating under his authority.

### **CONCLUSION**

For the foregoing reasons, the Board should reject the Regional Director's (and Hearing Officer's) findings, conclusions and recommendations, and set aside the election as Deming is a supervisor that engaged in objectionable conduct that could have influenced the election.

Dated: May 19, 2017  
Albany, New York

Respectfully submitted,

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